IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRIMINAL APPEAL NO.2065 SB OF 2002

DATE OF DECISION: DECEMBER 20, 2007

Pala Ram and another

.....Appellants

VERSUS

State of Haryana

....Respondent

CORAM:- HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgement?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

PRESENT: Mr. K. S. Dhaliwal, Advocate,
for the appellants.

Mr. Yashwinder Singh, AAG, Haryana,
for the State.

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RANJIT SINGH, J.

Another case under the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, “the Act”), where the same infirmities are pointed out by the counsel representing the appellants to say that the prosecution has not succeeded in proving the case against the appellants. As is usually noticed, the submission in the present case also relates to conscious possession having not been proved, police having not joined the independent witness and non-compliance of various statutory and mandatory provisions

under the Act.

The facts, in brief, are that on 20.11.2000, the police party headed by Sub Inspector Shamsher Singh (PW8) received a secret information while he was on checking and patrolling duty in the area of Village Kharodi. The secret information was to the effect that two young boys were statedly sitting on the plastic bags (Kattas) containing some contraband on the southern side of Rajbaha leading from village Sultania to village Kharodi. Information further was that they were waiting for a vehicle to carry intoxicant, which was suspected to be contained in bags. The police officials were also apprised that they could be caught red handed in case raid was conducted. PW8 alongwith other police officials reached the culvert in the area of village Kharodi. He met Banta Singh, Sarpanch and Mukand Lal, Panch, at the said place. He requested them to join the raiding party but they refused. PW8 alongwith other police officials then proceeded towards the spot indicated in the secret information. There PW8 found both the appellants sitting on the plastic bags. The police party allegedly encircled the appellants and apprehended them. On enquiry, the appellants disclosed their identity being Pala Ram son of Gita Ram and Joginder Singh son of Dewa Singh. The police party also noted 12 small plastic bags (Kattas) lying there. The appellants were statedly sitting on these bags containing writing reading “Shakti Bhog Atta” on these. Bachan Singh and Chuhar Singh had also reached at the spot. The police asked them to join as independent witnesses but they also showed their inability to do so. Suspecting that the bags contained some narcotic substance, the appellants were served with notice to ensure compliance of Section

50 of the Act. Exs.PE and PF are the notices in this regard and are containing offers to them if they wanted to be searched in the presence of a Magistrate or a Gazetted Officer. The appellants gave their replies, Exs.PG and PH, opting for being searched in the presence of a Gazetted Officer. These replies were attested by ASI Mohan Lal and ASI Des Raj. Thereupon both the appellants alongwith the bags were taken to the office of DSP Guhla, Om Parkash (PW1). On direction of PW1, Sub Inspector Shamsher Singh (PW8) searched the bags. All the bags were found containing poppy husk. 200 grams of poppy husk was separated from each bag as a sample and made into separate parcels. The bags were weighed. 10 bags were found having 18 kgs. and 800 grams of poppy husk in each. One bag was found containing 17 Kgs. 800 Grams of poppy husk whereas another was found having 15 kgs. and 800 grams of the contraband. Samples and bags were made into separate parcels and were sealed with the seal bearing impression `SS' of Sub Inspector Shamsher Singh. Seal bearing impression `OP' of the DSP was also put on the same. Specimen impression of the seals were also prepared. PW8 handed over his seal after use to ASI Mohan Lal whereas DSP kept the seal with himself after use. All the packages were taken in possession including the seal. Ex.PC is the ruqa, which was sent to the police station, on the basis of which FIR Ex.PC/1 was recorded.

Strangely, it is noticed that Sub Inspector Shamsher Singh again took the appellants, the case property including the witnesses to the place of recovery. The rough site plan, Ex.PL, was then prepared. The appellants were arrested. The case property, on

return to the police station, was deposited with the MHC etc. Samples were also sent to the Forensic Science Laboratory, Madhuban, for analysis. After completion of necessary investigation, challan was presented. Trial followed and the conviction and sentence of 10 years coupled with fine of Rs.one lac under Section 15 of the Act. In default of payment of fine, the appellants were further sentenced to undergo RI for two years.

The case of the prosecution is supported mainly by the police officials, namely, DSP Om Parkash (PW1), Sub Inspector Shamsher Singh (PW8) and ASI Mohan Lal (PW7) besides other police officials. The appellants, in their defence, pleaded their false implication. Appellant Joginder Singh claims that he alongwith his friend Pala Ram was searched by PW8 on 18.11.2000 when nothing incriminating was recovered from them. According to the appellants, they both were then taken to police station and illegally detained. On 19.11.2000, Bhuran Ram, father-in-law of appellant Joginder Singh, alongwith some respectables of the village, had met S.H.O. when the SHO disclosed that the appellants were detained under Section 109 Cr.P.C. and would be released on bail. On 20.11.2000, they were falsely implicated in this case by showing recovery of poppy husk, which according to the appellants was lying unclaimed outside village Kharodi near water channel, for which information was given to the SHO by the Panchayat of the village. It is the case of the defence that this contraband had already been removed from the scene to the police station and the appellants falsely implicated in the case. It is further disclosed that father-in-law of appellant Joginder Singh had given various representations to different authorities and

co-appellant Pala Ram had also made representations from jail to the High Court and Human Rights Organisation. Similar is the line of defence advanced by appellant Pala Ram before the trial Court. The appellants also examined 3 witnesses in their defence and they are Brij Lal (DW1), Jagar Singh (DW2) and Bhura Ram (DW3). It is accordingly pleaded that the appellants have been falsely implicated.

I have heard learned counsel for the parties.

Mr.Dhaliwal, appearing for the appellants, would mainly contend that this is a case where prosecution has miserably failed to prove the recovery of the contraband from the conscious possession of the appellants. He would further highlight that this is a case where false implication of the appellants is clearly established from the evidence on record. According to the counsel, the case of the prosecution is totally dependent on the police witnesses, by projecting that the independent witnesses, who statedly had reached the scene, had not joined being not willing to be associated. They, however, had appeared as defence witnesses to support the case set up by the appellants. Accordingly, the counsel contends that it will be totally unsafe to maintain this conviction. Learned State counsel, however, would say that efforts were made to join independent witnesses but they refused and accordingly the case of the prosecution though only supported by police witnesses, can not be disbelieved only on this count, especially so when efforts were made by the police to join independent witnesses etc.

There is not much dispute in regard to the basic issues that may arise in the present case. The present case is a case of recovery from an open place and this fact is not disputed. There is

also no dispute between the parties that the case of the prosecution is supported by only the police witnesses. No independent witness has come forward to lend assurance to the case of prosecution. As per the prosecution, both the appellants were found sitting on the bags, which were lying in open. The story projected by the defence, however, is different. According to the appellants, they were taken in custody two days prior to their implication in this case and as such, it is established from record that they have been falsely implicated by showing this recovery from them.

Version of PW8 is that he alongwith other police officials saw both the appellants sitting on the bags in an open space. He, however, concedes that the bags were removed to the office of DSP at police station alongwith the appellants for being searched in the presence of a Gazetted Officer. Why it was done is really not forthcoming. Normally, the scene of incident and the examination thereof is one of the important aspect of investigation. To lend credence to the case set up by the prosecution, the case property was required to be kept at the place from where it was recovered instead of removing it to the office of DSP in the Police Station. The fact that the property was statedly taken to the DSP office would tend to support the plea of the defence that the contraband had been recovered as abandoned and removed to police station. The appellants plead that the contraband was found lying in at the scene abandoned and was removed to police station on being reported by the Panchayat. The fact that the contraband had been weighed and searched in the presence of DSP in his office would compel one to think that the story as projected by the appellants may be true.

Another fact of significance is that PW8, after carrying out search of the contraband, had again brought it to the scene of incident. Why would he do so? Obviously, he was aware of the requirement of conducting investigation at the scene of recovery. He is not novice but a mature police officer. He could have easily called the Gazetted Officer at the scene instead of removing so many bags to the office of DSP. This aspect would lend credence to the case set up by the appellants that this contraband was found abandoned and was removed to the police station and that the appellants were falsely implicated in this case subsequently. The fact that these bags were lying abandoned would find support from the evidence of Jagar Singh (DW2). This witness has his fields near to the place from where the contraband was allegedly recovered. He came forward to depose on oath that on 18.11.2000, he had gone to irrigate his fields when he found the bags lying abandoned nearby. He accordingly informed the Panchayat, which reported the matter to the SHO of the area. He has further deposed that the bags were removed from the scene by the SHO. Except for addressing one question to this witness that he had given incorrect version to help the appellants, no question otherwise was put to this witness by the prosecution. Brij Lal (DW1) is a Member Panchayat of village Kharodi. He has corroborated the version of Jagar Singh that he had informed the Panchayat about unclaimed poppy straw lying near his fields. DW1 states to have then gone to the place where the poppy husk was found lying. He had informed the police on telephone about the poppy straw that was seen lying by him. DW1 was again addressed a similar question that he had come forward to help the appellants. It

is, thus, seen that the case set up by the appellants is not a baldly asserted but is supported by evidence on record, which is given by witnesses who are considered to be natural witnesses and can be expected to be present at the place from where recovery was effected. One of the witness is a person who had fields nearby the place from where the contraband was recovered. This fact is even conceded by SHO (PW8) in his evidence that DW2 had fields nearby the place of recovery. The other witness is a Member Panchayat who had informed the police about the abandoned poppy husk lying in an open space. Their version would receive support from the police version that contraband was checked in the office of DSP. It can well be argued that the bags found lying abandoned were removed to police station and later shown to be removed to the office of DSP for being searched in the presence of a Gazetted Officer. Thus, story projected by the defence would certainly cast doubt on the whole prosecution case. It may also need a notice that the burden to prove its case on the defence is not all that onerous as is on the prosecution. The prosecution can succeed by proving its case beyond reasonable doubt whereas defence would succeed on preponderance of probabilities. Taking into account the defence led by the appellants, it can be said that the defence projected may be true. The defence succeeds if it can show that what is urged, may be true whereas the prosecution can succeed only by proving its case `must be true'. As held, there is a long distance to be travelled between `may be true' and what `must be true'.

There is also much substance in the submission made by Mr.Dhaliwal that the prosecution even has not succeeded in proving

the appellants to be in conscious possession of the contraband. The evidence of the prosecution shows that the prosecution witnesses have stated that both the appellants were found sitting on the bags. When further questioned, PW8 states that he saw the appellants sitting on the bags from a distance of about half a kila. He has not claimed in his evidence that he knew the appellants earlier. In his cross-examination, PW8 further conceded that the appellants were apprehended from a distance of about 10 feet from the bags. This will also stand contrary to his version that the appellants were found or seen sitting on the bags. This evidence, even if taken at face value, would not to prove the appellants to be in conscious possession of the contraband. No investigation was conducted by the police to find the source from where these bags had come. It would be difficult to attribute conscious possession of the contraband to the appellants merely because they were found sitting on the bags in an open space. Reference can here be made to the case of ***Avtar Singh vs. State of Punjab,*** 2002 (4) RCR (Criminal) 180 and number of other cases where the courts have held that a person can not be considered to be in conscious possession of contraband on being found sitting on the bags. Police should have investigated the case to show that the bags belonged to the appellants specially so when these were admittedly recovered from an open place not belonging to the appellants. No independent witness has come forward to support the prosecution case. A person having fields near to the place of recovery has been produced to support the defence. The conduct of the investigating officer in removing the bags from the spot to the office of DSP can neither be appreciated nor can be

justified. This would sound strange when seen in the background that bags and the witnesses were again brought back to the spot of recovery. Why this appears to have been done is that the bags, as stated by defence, were recovered as abandoned and later when appellants were involved, perhaps brought to the spot to complete the formalities. The recovery was early in the morning and is supported by the evidence of police witnesses alone. In the facts of this case, as noted above, it is unsafe to rely upon the evidence of police witnesses alone. To lend assurance, some independent account can rightly be asked for in this case. Even the seal after use was also given to a subordinate by the SHO whereas DSP had kept his seal himself. Recovery was on the basis of secret information. The provisions of Section 42 of the Act were also not complied with. This aspect has been explained by the trial Court by saying that the said provisions were not attracted, the recovery being from an open place. The infirmities, as noticed, would still make it unsafe to sustain this conviction. It can be said that the defence was able to substantiate its plea of false implication, which would emerge from the evidence led by the prosecution as well as the evidence brought on record through the defence witnesses. The defence has been able to succeed in creating doubt on the whole prosecution story on the basis of evidence, which can not be easily ignored. Giving benefit of doubt, I would hold that the prosecution has not succeeded in proving the case against the appellants to the hilt.

The appeal is accordingly allowed. The conviction and sentence as awarded to the appellants is set-aside. The bail bonds

and surety bonds, if any furnished in the trial Court, shall stand discharged.

December 20,2007 **(RANJIT SINGH)**
khurmi **JUDGE**